IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945

No. 482

EDWARD F. ZAP,

*Petitioner*

*vs.*

THE UNITED STATES OF AMERICA,

*Respondent*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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THE UNITED STATES OF AMERICA,

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## Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioner, Edward F. Zap, hereby petitions this Honorable Court for a writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause from judgments of conviction of Counts 4 and 5 of an indictment which were affirmed without opinion upon the merits of the questions raised by the petitioner in a case in which the United States of America was plaintiff in the District Court of the United States for the Southern District of California, Central Division, and the petitioner was the defendant.

The case was tried before a jury which returned verdicts of guilty as to Counts I, IV and V. The Government conceded that the conviction on Count I was er-

roneous and the Circuit Court of Appeals reversed Count I but affirmed Counts IV and V. The opinion of the Circuit Court of Appeals fails to set forth any grounds upon the merits upon which the judgments as to Counts IV and V were affirmed.

## Jurisdiction.

The jurisdiction of this court is invoked under Section 240a of the Judicial Code (Title 28 U. S. C., Section 347, as amended) and the rules of criminal practice of this court.

From a trial in the U. S. District Court the defendant duly and regularly appealed. The Ninth Circuit Court of Appeals affirmed the judgments as to Counts IV and V on June 4, 1945. Petition for rehearing within the time fixed by law was duly and regularly filed. This petition was denied September 13, 1945. Upon application of the petitioner the mandate was stayed to and including the determination of this court.

## Decisions of the Court Below.

The only opinion written by a Circuit Court of Appeals was the opinion of June 4, 1945, which appears on page 805 of the record.

## Statutes Involved.

Title 18, Section 80 (presenting false claims). The Fourth and Fifth Amendments to the U. S. Constitution; Title 18, Section 611-616 regarding search warrants; U. S. Code, Title 50, Sec. 643 (First War Powers Act), and the President's Executive Order 9127; Title 28 Section 411 U. S. Codes regarding selection of jurors according to state practice; Code of Civil Procedure of California Section 204.

## SHORT STATEMENT AND SUMMARY OF FACTS.

### A. Facts of Case.

Petitioner Edward F. Zap is one of the foremost experimental aviation engineers in the world. Inventor of the Zap or split flap* [R. 557], the folding hinge winged device and other patents he has been advisor to the U. S. Navy on experimental work since 1927 [R. 561]. Working day and night, taking flight tests and doing experimental engineering, the actual work on his plans and designs was subcontracted and carried out by other firms. Because of difficulties and delays with subcontractors in getting the work out as desired by Zap and the navy, he secured his own plant in 1942, consisting of between 55 and 100 men. As he made flight tests along with flight pilots, worked in offices on field locations, made trips to Washington he frequently signed papers and checks in blank and left them for his office help to fill out [R. 468].

To make out his accounts, keep his financial records, and carry out the desires of the navy Zap consulted the Security First National Bank of Los Angeles and upon their recommendation hired Certified Public Accountant Cedrick Browne [R. 417]. He also hired a comptroller, Harry Champlin, whose job it was to keep track of books and records and payrolls with Browne. [R. 416]. Ethel Boyle, a bookkeeper, actually kept the books. Zap never looked at them or saw them [R. 476].

The navy maintained several inspectors at Zap's plant. They audited accounts and they made out the claims to

*The flap enables shorter takeoff and shorter landings.

be filed. On cost plus items, Zap would notify the cost inspector and request that the charges be audited and approved and the necessary vouchers prepared [R. 291]. After the navy had reviewed the item, the voucher would then be prepared forwarded to Mr. Zap for his signature, then, after being signed by the cost inspector, would be forwarded to the disbursing officer in San Diego [R. 291].

There was always a certain amount of retention of funds, and in event of mistake or are incorrect the items would be reaudited and the items corrected [R. 393]. Zap was arrested on the particular item in Counts IV and V before such reaudit or correction.

A new Zap experimental airplane having been completed and requiring flight testing and re-engineering, Zap hired William Henry McAvoy, a flight test pilot of renown, to make the tests [R. 304]. The letter of Zap to the Navy, requesting authority, contained the quotation "A. Chief test *pilot's fee and insurance*" $4000 [R. 305] (Govt. Exh. 3.)

The fees for the flight test include all the incidentals that go with it — the cost of the pilot to and from his home by airplane [R. 305]. Zap took care of these [R. 305]. Expenses on the trip. Living expenses while on location. Insurance of every kind on the pilot, the plane, and workmen [R. 306-7] Zap accompanied the pilot, made sixteen flight tests, engineered the data, working day and night [R. 308].

On September 23, 1942, before Zap left for his flight test, his bookkeeper, Ethel Boyle, gave Zap a personal check on his bank account, which she had dated but which was not filled out.

On September 23, 1942, Zap and his crew went to Daggett Field, California, a distance of about 100 miles from Los Angeles, to flight test the new Zap airplane. Zap paid all expenses. He obligated himself to all insurance, the insurance items amounting to two or three or four thousand dollars [R. 487].

Zap paid McAvoy $2,075 by check at the field. He gave McAvoy $300 in cash at the field. He gave McAvoy an additional check for $200 at the field and $50 petty cash. He also paid flight insurance as agreed upon and obligated himself for considerably in excess of $4000.

After the flight test Zap returned to Los Angeles where the navy cost inspector made out a claim and voucher, according to its procedure, for $4300. It was sent to Zap for signature, and signed and notarized; it was countersigned by Commander G. A. Smith and by Ensign Minor. The claim does not itemize what the $4300 was for. Although the Government charges a claim for $4000 was false, it was this claim for $4300 which the Government presented in evidence against petitioner as to Count IV.

Also, it was not denied by the government that although the indictment charged that McAvoy had received $2375 and no more that McAvoy had received $2625 and that Zap had paid all expenses of travel and flight test insurance and that he had paid or had obligated himself in excess of $4000.

When Zap left on the trip on September 23, 1942, Ethel Boyle, bookeeper, gave Zap a personal check in blank on which she had typed the date. On the flight test Zap asked McAvoy to endorse the check, saying, according to McAvoy it was going to be used for drawing some money to cover general expenses [R. 301]. Mc

Avoy endorsed it. When Zap returned on October 13, he had also endorsed it, but the check was entirely blank. Ethel Boyle asked Certified Public Accountant how to fill it in and whose name to fill in. Browne told Miss Boyle to fill it in for $4000 which she did also to type in the name of McAvoy. Zap knew nothing about this [R. 406-7]. She affixed a rubber stamp endorsement on it and immediately deposited it in Zap's personal account [R. 407]. It appears later put away in Zap's private file from which it was taken without Zap's knowledge or consent or any second warrant at the request of F.B.I. Agent Myerson. The check was Government's Exhibit 7.

On October 18, 1942, Zap left for Washington, D. C., to flight test his airplane at the navy testing grounds at Anacostia.

One Harry Champlin was working for Zap as comptroller Champlin conceived the idea that if he could get Zap arrested and imprisoned that the navy would put him in charge of Zap's plant. Stuart Eldridge Waver, Jr., was placed in charge of Zap's business while Zap was in Washington.

**Facts as to Procedure. The Search and Seizure.**

On October 20, 1942, FBI agents, called in through Champlin, began searching Zap's books and records *without* any search warrant or other security [R. 135, *et seq.*] On occasions they clashed with navy inspectors who said they had no right to look at the confidential books of navy contractors. On October 31, 1942, the FBI agents Myerson and Earl secured a search warrant on the basis of an affidavit of Harry Champlin. The Government in the Circuit Court of Appeals conceded that this affidavit was insufficient to show probable cause.

On November 5, 1942, FBI Agent Myerson, without a search warrant, went to Ethel Boyle, Zap's bookkeeper, and asked her to get the check which Zap had endorsed in blank and McAvoy had endorsed in blank and which she later filled in [Gov. Exh. No. 7] and turn it over to him. She got it out of the file and he seized it and kept it for the government's evidence.

On November 6, Zap protested against the FBI agents examining his confidential books and records and seizing them. He said Champlin was trying to smear him and had been fired. The agents told him to go home and take a scotch and soda [R. 149]. They continued their search.

December 1, 1942, the agents secured another search warrant based upon Harry Champlin's faulty affidavit and their previous search under it. Under this search warrant they seized books and records which were later introduced in evidence. There was never a search warrant for Gov. Exh. 7.

**Zap and Scott Jointly Charged.**

Zap and Lieutenant Commander Lloyd V. Scott were jointly indicted and charged with presenting false claims. As the trial court directed the verdict as to all counts relating to Scott at the close of the government's case the question arises as to whether the acquittal of one did not acquit the other as a matter of law.

**Zap's Defense Material Sequestered.**

Immediately after Zap's arrest all of his files and office papers were boxed up in thirteen large boxes and taken to the government's bombproof shelters at Douglas Aircraft Company and held under guard. Although the

navy said it would release them to Zap upon any order of court, the district judge before whom the matter originally came on for hearing declined to make any order for want of jurisdiction [R. 32]. Government counsel opposed the defendant's *request to get his own files* to make his defense.

**Zap's Motion for Continuance Denied.**

At the opening of the trial, a motion for a continuance to give defense counsel ten days time to prepare because his files at the Douglas Aircraft had been surrounded by 300 pound boxes of ammunition which could not be moved was denied [R. 214, 243] and exception noted.

**Timely Motion Made to Suppress Evidence. [R. 127, 134, et seq.]**

In advance of trial, timely motions were made by Zap to suppress and return the evidence illegally searched and seized. The prosecution countered that it had only searched pursuant to the search warrant. It claimed seizure only under the search warrant. This warrant it later admitted was based upon a faulty affidavit.

The defendant gave notice [R. 134-135] and requested permission to take oral testimony on the motion to suppress, as he wished to call the FBI agents in support of his motion. The court denied permission to take oral evidence [R. 237, 238]. Again reviewed in the trial [R. 368, 369, 380] an offer of proof that an examination of Myerson would show he acted illegally and without authority and without a search warrant or other legal authority was rejected [R. 166, 167].

**Champlin Plans to Take Over Zap's Business.**

While Mr. Zap was in Washington Champlin told various employees in the office that Zap was going to be arrested [R. 499] and he admitted that he made out the affidavit for the search warrant for the FBI [R. 500]. He never at any time telephoned Zap or informed him of the investigation, but he did O.K. a telephone call by Mr. Hanley to Washington to see what could be done about taking over the business of Zap. This call was made on October 27, 1942, four days before Champlin made the affidavit for the warrant [R. 501].

**Zap Complains of Search Without Warrant.**

Zap complained to the FBI agents about their searching his premises or his books and records [R. 148]. He observed Myerson and Sloane daily making an inspection and examination of books, records and documents throughout the entire month of November, until November 25th, but they had no search warrant of any kind or any process or pretended process.

On or about November 6, 1942, Zap called a meeting of his several employees, and in the presence of Myerson and Sloane objected to their entering his safe and using Champlin, saying, "It is not right for you to go in there and use Champlin, as he is the crook and is trying to smear me. He has already been fired and has no right to be in the office, and no one has any right to look at these papers as they are the confidential papers of Edward F. Zap Aeronautical Engineers and concern their contracts with the navy." That the said Myerson and Sloane did not at that time have any search warrant for

the examination of the books, papers, records, ledgers, ledger sheets, cost sheets, payroll accounts, journals and documents [R. 149].

When Zap protested that no one had any right to enter the safe and look at these confidential records and documents Myerson said he was going to examine them for himself and find out what facts he could, and stated to Zap, "You had better go on home and have a scotch and soda and forget your troubles here." [R. 149.]

Ethel Boyle also made an affidavit that all of these books, records and documents were in a safe or in the personal desk of Mr. Zap and could not be observed, but that from time to time these FBI agents asked her to open the safe each morning, and whenever they wanted to get something out of it, and that as a result they continued their inspection during the month of November [R. 153-156]. This is corroborated by the affidavit of Estelle Zap [R. 157-160].

**Insufficient Affidavit Used to Secure Search Warrant.**

On December 1, 1942, Myerson made an affidavit for a search warrant pursuant to which search warrant he seized, according to his return, the exhibits which were later admitted in evidence as exhibits 32 to 45 in evidence. This affidavit did not set forth the commission of any crime or any probable cause, but merely said "This affidavit is made for the purpose of securing a warrant for the search of the premises known and described as follows: The two ground floor rooms of the premises occupied by E. F. Zap Aeronautical Engineers and located at 1005 Broxton Avenue, Westwood Village, Los Angeles, California. "That affiant was on the above premises by reason of a previous search warrant and observed

the hereinafter described books and documents. That, by reason of the above facts affiant says that at the above described premises, there is now unlawfully possessed and kept the following described property, articles and things: . . . ." (Listing certain things which became exhibits 34 to 45 in evidence.) [R. 178.]

No other fact was set forth in the affidavit of Myerson. No allegation of fact is contained in the affidavit as to any violation of any law.

Pursuant to this search warrant a return was made of these documents [R. 176, 177] which were later admitted in evidence against appellant.

All of the employees of Zap stayed on for several weeks after his arrest, hoping that the matter would be cleared up.

**All Other Zap Papers Looked Up.**

Immediately after December 1st, however, the navy took into its possession and protective custody all of Zap's papers, documents, records, general correspondence and files, and removed them to a bomb and fire-proof vault at the Douglas Aircraft Corporation [R. 124, letter of Commander Smith dated December 7, 1942]. Commander Smith stated in his letter that "upon order of the court, any part of the material described above will be released to the court. *Please give at least two days' advance notice in order that we may open up the boxes and get the files or drawings desired.* They will then be surrendered to the court." [R. 125.] These boxes contained everything that Zap had, including his contracts, invoices, vouchers, files, etc. (Italics ours.)

Zap made a motion and request of the court to have these things returned to him, but Judge Leon Yankwich denied the motion on January 12, 1943, holding that he had no jurisdiction in the matter; exception noted [R. 32]. This left Zap without any of his records, or his own files to prepare his defense.

**Demurrers and Motion for Bill of Particulars Overruled and Denied Excepted to.**

Demurrers [R. 102] and motion for a bill of particulars [R. 110] were duly filed; also motions to suppress and return the evidence illegally seized in violation of the Fourth and Fifth Amendments to the United States Constitution [R. 128]; also a motion to inspect the minutes of the grand jury and the plea in abatement, on the ground that the indictment was based upon illegally secured evidence [R. 134].

The court overruled the demurrers on all of the grounds therein specified; which grounds were the vagueness and uncertainty of the indictment and its failure to state an offense against the laws of the United States, duplicity of the counts, failure to apprise the accused of the nature and cause of the accusation, failure to set up facts regarding any of the allegations in the indictment [R. 102, *et seq.*]

**Bill Demanded Terms of Contract; Also Claim.**

The demand for a bill of particulars requested the provisions and terms of contracts NXs 4105 and 83142, as well as the terms of any and all supplements and amendments thereto; the exact and specific terms of the claim allegedly presented by Mr. Zap. The same request was made as to Counts IV and V, with the additional request

for the same of the disbursing officer to whim the alleged claim was presented and the exact items that were allegedly paid to William H. McAvoy and what expenses he was paid for, and what portion or portions of the claim it was alleged were false and under Count V, to set forth the exact material fact that was alleged to have been concealed and the alleged false and fraudulent statement and representation and wherein it was claimed to have been false and fraudulent; the exact duties of Hilton Byars; and the exact items for which McAvoy was allegedly paid approximately $2,375.00.

This demand for a bill of particulars was denied and exception allowed.

A notice to produce books, papers and records of Zap, including all contracts involved, and all correspondence, etc., was served on the United States Attorney [R. 208-210] on April 3, 1943 [three days before trial, R. 210].

A plea in abatement was also filed by defendant Zap on the ground that the grand jury which indicted him was illegally constituted in that it was composed entirely of men and that no women were on the panel, and that their selection was in violation of Title 28, Section 411, U. S. C. [R. 210-212]. This plea was also overruled by the trial judge and excepted to [R. 243, 244, 255].

At the outset of the trial on April 6, 1943 [R. 243] defendant Zap objected to proceeding to trial on the ground that all of his papers and documents which he needed for his defense were locked up in a bomb-proof shelter and that the Government had resisted defendant's effort to get them; that he had no adequate opportunity to prepare his defense in view of the fact that he could not get to the boxes and that army and navy representa-

tives were present in the room where they were at all times [R. 244, 246].

The affidavit of Zap in support of this motion showed that the boxes were surrounded by several very large boxes each weighing 360 pounds and it was impossible to move them [R. 215]. It was the Government's position that for the defendant to get possession of his own papers he had to specify just what papers he wanted [R. 250].

Appellant requested a ten-day continuance so that he could prepare his defense [R. 252]. The Goverment resisted the giving of these papers and files to Zap, and further resisted the bill of particulars [R. 254, 255].

The court denied the motion for a continuance, and exception was noted [R. 255].

Zap also objected that his rights under the Fourth and Fifth Amendments to the Constitution of the United States were violated [R. 257].

The court then proceeded with the calling of the jury. The jurors were duly impaneled and sworn to try the case, and the trial began.

**Juror Excused After Impanelment Without Zap's Consent.**

After the selection of the jury, on the second day of the trial, Government and defense counsel held a discussion at the bench, without the hearing of the jury and defendants Zap and Scott [R. 261]. At that time Government counsel asked that juror No. 2 be excused because he was observed to go over and shake hands with defendant Scott and enter into a conversation with him [R. 261]. FBI Agent Myerson had observed this according to Government counsel, as did also Mr. Sloane.

The Government, which had resisted calling Murray Myerson as a witness in the matter of suppressing the evidence, took testimony from Myerson regarding his observation of this juror [R. 263]. After the testimony and the demand by the Government to excuse juror No. 2, a Mr. Wiget,—which was at first resisted by counsel for defendant Zap, counsel for defendant Scott agreed to the excusing of said juror and this stipulation was joined in by counsel for defendant Zap. Counsel then returned to their seats at the counsel table and the court excused Juror Wiget [R. 272].

Defendant Zap was neither consulted, nor did he hear the proceedings, nor was his consent obtained prior to the excusing of this juror. His counsel, however, had expressly consented at the bench.

On the morning of the second day of the trial the Government gave to the defense, for the first time, the documents and records belonging to Zap which had been held by Commander Smith of the navy [R. 273].

The indictment charged 13 counts. The Government proceeded on the theory of a conspiracy and joint operation of defendants Zap and Scott. At the close of the Government's case, however, the court granted the motion of defendant (Lieutenant Commander) Scott for a directed verdict on the ground of insufficiency of the evidence, and directed a verdict in his favor on all counts. He denied Zap's motions and allowed exceptions.

During the course of the trial defendant Zap again renewed his motions to suppress the evidence and strike from the evidence the exhibits which had been seized without any search warrant or other legal process or pretended process, on the ground that they were violative of

the Fourth and Fifth Amendments. These motions were denied [R. 368]. The court even declined to reconsider the motions because they had been passed upon by a previous judge, to-wit, Judge Yankwich [R. 369], and took the position that he would not go over the matters that Judge Yankwich had passed upon. This was assigned as error and exception taken [R. 369, 380].

The defendant Zap also asked leave to call Murray Myerson as a witness regarding his illegal search and seizure of the evidence, which motion was denied, the court refusing to permit the taking of oral testimony from Myerson [R. 380].

The motions to strike Exhibit 7 on the ground of illegal search and seizure under the Fourth and Fifth Amendments were also denied [R. 379, 380].

An offer of proof as to what Myerson would testify to was rejected and exception noted [R. 378-380].

At the close of the Government's case defendant Zap made motions for a directed verdict, and again renewed his motions at the close of his own case, which motions were denied and exceptions noted.

**Wilfulness Defined as Careless Disregard. No Instructions Given Jury on Statute.**

**The trial court read the indictment to the jury, but never the statute or the statutory definitions of the crimes charged.**

The trial court instructed the jury that "wilfulness means . . . conduct marked by careless disregard as to whether or not the thing done is lawful." [R. 689.] This instruction was objected to as incorrect standard under the statute of this case.

The court also singled out this appellant in the course of his instructions, over objections, by stating that the jury had a right to take into consideration the interests that the defendant Zap might have in the case, his hopes and fears, and what he had to gain or lose as a result of the verdict. [R. 686.]

During the course of the instructions to the jury the trial judge told the jury that it could disregard the reference in the indictment to the defendant Scott, who was jointly charged with defendant Zap in the plural; the indictment referring throughout to the defendants Lloyd V. Scott *and* Edward F. Zap having allegedly committed the acts charged. The jury after retiring had great difficulty with the indictment and asked to have it reread, and also asked for the instructions to be sent to the jury room.

Motions for a new trial and in arrest of judgment were made and denied, and exceptions noted [R. 731, *et seq.*]

**"Motion to Remand After Trial on Discovery of Forgery."**

On the last day of taking evidence in the trial, a document was first shown to Zap, page 5 of Exhibit 49, which the government used in evidence to convict him of Counts IV and V. Properly the document appeared to be a "certificate" within the meaning of Count VI of the indictment, which was dismissed. Actually it was submitted to the jury in support of Counts IV and V. It was undated, unnotarized and there was no navy stamp on it or

anything to indicate or show when it got to the navy or how or why.

Zap testified the document looked strange to him. It was on stress paper, the kind he usually made out his technical stress reports on and had sent to the navy.

Immediately after the trial it was submitted to Lawrence Buys, formerly with the FBI and an examiner of questioned documents. He pronounced the document a forgery, declaring that the typing on it had been done over Zap's signature, which was on the paper first.

A motion was made in the Ninth Circuit Court under Rule III, Sub. 2 to remand the case to the trial court for consideration of a motion for a new trial because the document was forged and counterfeited.

The Circuit Court expressing itself in the oral argument that a "forgery" is not "newly discovered evidence" within the meaning of the rule, denied the motion, exception noted in that court.

**Circuit Court Affirmed Without Opinion on Merits.**

In the Circuit Court of Appeals the appellant also filed opening and closing briefs and a separate statement of jurisdiction together with all the statutes involved and the questions presented by the appeal. The Circuit Court, holding that no "specification of errors" had been filed pursuant to its rules, affirmed the judgment without opinion on the merits of each of the questions raised.

## Questions Presented by This Appeal.

1. Whether the seizure by an F. B. I. agent of a personal check, [Government's Exhibit 7], which he requested and employed to take from the defendant's files without a search warrant and used to convict petitioner violated his rights under the Fourth and Fifth Amendments to the Constitution of the United States. Whether the timely motion to suppress this check in advance of trial should have been granted and whether the motion to strike it from the evidence in the trial should have been granted.

2. Whether the seizure of books and records on an insufficient affidavit of probable cause, and their introduction in evidence over timely objections, violated petitioner's rights under the Fourth and Fifth Amendments to the U. S. Constitution.

3. Whether the right of particular agencies of the government as authorized by Congress and the President, to audit and inspect certain government contractor's books and records and files permits another branch of the government, not so authorized, to seize such books and records without a search warrant and use them in evidence in a criminal prosecution.

4. Whether on a motion to suppress the evidence and return the articles illegally seized the accused may produce oral testimony and call hostile witnesses both before and during trial.

5. Whether upon the trial of the case he is permitted to renew his motion and take oral testimony, or whether the trial court may decline to hear the evidence and deny the motion.

6. Whether an accused, suspecting that his indictment is based upon documents, books and records illegally

seized, may inspect the minutes of the grand jury to see if those documents have been used to bring about his indictment.

7. Whether a grand jury or petit jury selected entirely from and composed entirely of men in a state where doormen have sat on the grand and petit juries for years was illegally constituted.

8. Whether in an indictment charging the filing of a false claim by a Navy prime contractor the indictment is insufficient to inform the accused of the nature and cause of the accusation under the Sixth Amendment where it fails to set out the claim.

9. Whether after the jury was impanelled and sworn the trial court adopted the correct procedure in excusing a juror without the personal knowledge or consent of the accused.

10. Whether the trial court erred in failing to sustain the demurrer to the indictment where the indictment in Count IV alleged the presentation of a false claim without specifying the claim or setting it up.

11. Whether Count V alleged duplicitously concealment and covering up a material fact and at the same time making a false statement.

12. Whether the trial court erred in failing to sustain the demurrer to the indictment as failing to state a public offense in Count V in failing to set up the alleged false statement and the authority of the person to whom the alleged false statement was made.

13. Whether the trial court erred in failing to grant the request for a bill of particulars as to Counts IV and V where the petitioner had none of the information requested and necessary for his defense.

14. Whether the trial court erred in failing to continue the trial at petitioner's request for ten days because he could not get access to data necessary for his defense.

15. Whether the acquittal of Scott, in a case tried on the theory of a joint conspiracy between Scott and Zap, necessarily acquitted Zap.

16. Whether the court's instruction to the jury to disregard Scott who was named in the indictment, vitiated the indictment.

17. Whether a civilian cost inspector could give permission to someone outside of the list named by the president of the United States in his executive order to examine defense contractor's records.

18. Whether the elimination of women from the grand jury or petit jury invalidated the indictment, as not having been returned by a properly constituted grand jury.

19. Whether the trial court should have directed the verdicts for insufficiency of the evidence as to Count IV where the evidence showed that there was no claim for $4000 as alleged, but one for $4300; where it was shown that the contractor had obligated himself in excess of $4000 for the services involved; where the claim was prepared by the navy auditors themselves after their own audit, and was countersigned by a navy commander and navy ensign cost inspector as true and correct and where there was no proof of guilty knowledge or wilfulness as required by the statute.

20. Whether the trial court should have directed the verdicts for insufficiency of the evidence as to Count V which charged petitioner with falsifying and concealing a material fact and making a false and fraudulent state-

ment to Hilton Byers when the testimony fails to show a statement to Hilton Byers as alleged.

21. Whether the trial court erred in implicitly holding that a defense prime contractor is responsible for the acts of his employees, even though done without his knowledge, in the face of the statutory requirement that the offenses are only committed "knowingly" and "wilfully."

**22. Whether the trial court erred in failing to give the jury any instructions on the statute charged to have been violated (Title 18, Section 80) or definitions of the words used in the statute.**

23. Whether the trial court erred in giving an instruction over objections and exceptions that the word wilful is used in the statute in this case and means ". . . . conduct marked by careless disregard as to whether or not the thing done is lawful" [R. 689], which is contrary to the plain language of the statute.

24. Whether the trial court erred in giving an instruction singling out the defendant who took the witness stand, that it is proper for the jury to consider "the interests that the defendant may have in the case, his hopes and fears and what he has to gain or lose as a result of your verdict." [R. 686.]

25. Whether the trial court erred in failing to give requested defense instructions defining what constituted a claim within the meaning of the statute and what could be considered by the jury in respect thereto. (Defense Instruction 39 [R. 764]; and 43 [R. 766]; 44 [R. 767].)

26. Whether the trial court erred in failing to give proffered instructions that the petitioner had a right to rely on the accuracy of his own auditors and also on the

inspection of the navy cost auditors in considering his good faith, his lack of guilty knowledge or wilfulness, which instructions were refused and exceptions noted. (Instructions 40, 41, 42, 46 [R. 764-772]; 48, 49, 50, 52.)

27. Whether the trial court erred in admitting books and records in evidence which were not made by him and the contents of which he had no knowledge.

28. Whether the trial court erred in failing to arrest judgments in the case for insufficiency of and defects in the indictment.

29. Whether the trial court erred in imposing separate punishments on each of the counts involving the same transaction.

30. Whether the Circuit Court of Appeals for the Ninth Circuit erred in failing to remand the case under Rule 111, Subdivision 2 for consideration of a motion for new trial on the ground of newly discovered evidence immediately after the close of the trial where such evidence consisted of forgery of a document used to convict petitioner.

31. Whether the Circuit Court of Appeals erred in holding that there were no *specification of errors* as required by its rules, although appellant set out the "questions specifically presented" and presented the errors fully.

32. Whether the Circuit Court erred in deciding the case without an opinion on the merits of the many questions raised.

## Reasons for Allowance of the Writ.

### I.

The Circuit Court of Appeals has decided important questions of Federal Law without opinion on the merit which have not been, but should be, settled by the Supreme Court.

1. (a) Whether oral testimony may be taken of government agents on motions to suppress and return evidence; (b) whether rulings on motions to suppress evidence in advance of the trial are "the law of the case" or whether, upon their renewal in the trial the trial judge must again consider the admissibility of such illegally seized evidence; **whether government agents in a department not specifically designated by the president under Executive Order 9127 under the First War Powers Act are authorized to inspect, search or seize a prime defense contractor's books and records without a proper search warrant under a proper and lawful affidavit, showing probable cause. Whether they have such right even with a search warrant unless specifically permitted by executive order.**

2. Whether the seizure of a private check of petitioner and used to convict petitioner [Govt. Exhibit 7] violated petitioner's rights under the Fourth and Fifth Amendments to the Constitution of the United States.

3. Whether an indictment charging presentation of a false claim which fails to set up the claim fails to inform the accused of the nature and cause of the accusation as required by the Sixth Amendment to the Constitution of the United States.

4. Whether in a state which has had women in state courts on grand juries and petit juries a grand jury selected only from men and consisting only of men violates the congressional mandate.

5. Whether a trial court must define the offenses charged to the jury.

6. Whether an instruction that "careless disregard" of the thing done is error under a statute requiring specific knowledge and fraudulent intent.

7. Whether the verdict should have been directed for insufficiency of the evidence.

## II.

The Circuit Court of Appeals has decided several Federal Questions in a way probably in conflict with the applicable decisions of the Supreme Court.

## III.

This Court under its Supervisory Control of Criminal Procedure should pass upon several procedural matters of importance raised by this appeal, to-wit:

Whether oral testimony may be taken of government agents on motions to suppress and return evidence illegally seized; whether the hearing in advance of trial is the "law of the case" so as to preclude renewal at the trial and the taking of oral evidence at the trial; whether a federal court has jurisdiction on a motion to return books and papers held by another branch of the government solely for safekeeping, and whether fair trial has been accorded

where a continuance for ten days is denied at date first set for trial to make available papers in possession of government; whether an indictment for presentation of a false claim states an offense without setting forth the claim and whether a bill of particulars is required; whether a defendant is "present" within the meaning of the law where proceedings are had outside the hearing or knowledge of the defendant at the judge's bench to excuse a juror and the defendant's consent is not obtained; whether the trial court must tell the jury and define the statute and the offense to the jury upon which the accused is being tried;

Whether an instruction to the jury that the word "wilfully" means "a thing done . . ." by "conduct marked by careless disregard as to whether or not the thing done is lawful" under a statute requiring specific knowledge and intent, is erroneous.

Whether, upon the discovery of a forgery of a document used to convict appellant immediately after trial of the case a motion to remand the case for a new trial will lie under Rule III, Subd. 2 Rules of Criminal Procedure.

Whether a specification of the questions raised by the appeal in the Circuit Court of Appeals is sufficiently presented when it is set forth as "questions presented by this appeal."

**Cases and Statutes Believed to Sustain Jurisdiction.**

*United States Codes*, Title 28, Sec. 347;

*Boyd v. U. S.*, 116 U. S. 616, 29 L. Ed. 746;

*Amos v. U. S.*, 255 U. S. 313, 65 L. Ed. 654;

*Goldman v. U. S.*, 86 L. Ed. 1322;

*Olmstead v. U. S.*, 277 U. S. 438, 72 L. Ed. 944;

*Gouled v. U. S.*, 65 L. Ed. 654;

*Weeks v. U. S.*, 232 U. S. 383, 58 L. Ed. 652;

*McNabb v. U. S.*, 87 L. ed. 819;

*U. S. v. Cruickshank*, 92 U. S. 542, 23 L. Ed. 588;

*U. S. v. Simmons*, 96 U. S. 360, 24 L. Ed. 819;

*Edwards v. U. S.*, 312 U. S. 473.

Statutes on Search and Seizure:

*U. S. Codes*, Title 18, Sec. 611-618;

*Fourth and Fifth Amendments U. S. Constitution.*

Inspection of War Plants:

*U. S. Code*, Title 50, App. Sec. 643;

*Executive Order No. 9127*, April 10, 1942, 7 F. R. 2753;

*Statute on Selection of Jurors*, Title 28, Sec. 411;

*Code of Civil Procedure of State of California*, Section 204.

A supporting brief is being prepared and filed separately.

Respectfully submitted,

MORRIS LAVINE,

*Attorney for Petitioner.*

## APPENDIX

### Statutes Involved.

Sec. 80. (*Criminal Code, Section 35 (a).*) *Presenting False Claims.* Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015; June 18, 1934, c. 587, 48 Stat. 996; April 4, 1938, c. 69, 52 Stat. 197.)

The Fourth Amendment to the Constitution of the United States, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the Untied States, which provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, *without due process of law;* nor shall private property be taken for public use, without just compensation."

Title 18, Section 611, which provides:

> "A search warrant authorized by this chapter may be issued by a judge of a United States district court, or by a judge of a State or Territorial court of record, or by a United States commissioner for the district wherein the property sought is located."

Title 18, Section 612:

> "A search warrant may be issued under this chapter upon either of the following grounds:

"1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

"2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

"3. When the property, or any paper, is possessed, controlled, or used in violation of section 98 of this title; in which case it may be taken on the warrant from the person violating said section, or from any person in whose possession it may be, or from any house or other place in which it is concealed."

Title 18, Section 613:

"A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."

Title 18, Section 614:

"The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them."

Title 18, Section 615:

"The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

Title 18, Section 616:

"If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause of its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

Title 28, Section 411, United States Codes, provides:

"Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

Code of Civil Procedure of the State of California, Section 204, which provides:

"Jury lists: By whom and when made. In the month of January in each year it shall be the duty of the superior court in each of the counties of this

State to make an order designating the estimated number of grand jurors and also the number of trial jurors, that will, in the opinion of said court, be required for the transaction of the business of the court, and the trial of causes therein, during the ensuing year; and immediately after said order designating the estimated number of grand jurors shall be made, the court shall select and list the grand jurors required by said order to serve as grand jurors in said superior court during the ensuing year, or until new lists of (of) jurors shall be provided, and said selections and listings shall be made of *men and women* suitable and competent to serve as jurors, as set forth and required in sections 205 and 206 of this code, which list of persons so selected shall at once be placed in the possession of the county clerk; and immediately after said order designating the estimated number of trial jurors shall be made, the board of supervisors shall select, as provided in sections 205 and 206 of this code, a list of *men and women* to serve as trial jurors in the superior court of said county during the ensuing year, or until a new list of jurors shall be provided."

U. S. Code Annotated, Title 50, War, p. 282, provides as follows:

"643. Plant, books, and records of war contractors; definition of defense contract; agency designated to administer provisions.

"The provisions of section 10 (1) of an Act approved July 2, 1926 (44 Stat. 787; 10 U. S. C. 310 (1) (giving the Government the right to inspect the plant and audit the books of certain Contractors) shall apply to the plant, books, and records of any contractor with whom a defense contract has been placed at any time after the declaration of emergency

on September 8, 1939, and before the termination of the present war: Provided, That, for the purpose of this title, the term 'defense contract' shall mean any contract, subcontract, or order placed in furtherance of the defense or war effort: And provided further, That the inspection and audit authorized herein, and the determination whether a given contract is a 'defense contract' as defined above, shall be made by a governmental agency or officer designated by the President, or by the Chairman of the War Production Board." Mar. 27, 1942, 3 p.m., E.W.T., c. 199, Title XIII, 1301, 56 Stat. 185.

EXECUTIVE ORDER NO. 9127

April 10, 1942, 7 F.R. 2753

INSPECTION OF PLANTS AND AUDIT OF BOOKS OF DEFENSE CONTRACTORS

"By virtue of the authority vested in me by the Constitution and laws of the United States, and particularly by Title I of the First War Powers Act, 1941 (sections 601 *et seq.* of this Appendix), as President of the United States and Commander in Chief of the Army and Navy of the United States, and in order to prevent the accumulation of unreasonable profits, to avoid waste of Government funds, and to implement other measures which have been undertaken to forestall price rises and inflation, it is hereby ordered as follows:

"1. I hereby designate the War Production Board, the War Department, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation as the governmental agencies authorized to inspect the plant and to audit the books and records, as provided by Title XIII of the said Second

War Powers Act, 1942. Such inspection and audit and the determination whether a given contract is a defense contract, as defined in Title XIII of the Second War Powers Act, 1942, may be made in the case of (a) any contractor with whom a defense contract has been placed by such agency, or, in the case of the Reconstruction Finance Corporation, by any corporation created or organized by it, at any time after the declaration of emergency on September 8, 1939, and before the termination of the present war, and in the case of (b) any subcontractor performing work required by any such defense contract. The Chairman of the War Production Board is authorized to issue rules and regulations and to establish policies to coordinate and govern the War Department, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation in exercising the functions vested in them by this order.

"2. The authority herein conferred may be exercised by the Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, and the Board of Directors of the Reconstruction Finance Corporation, respectively, or in their discretion and by their direction, respectively, may be exercised also by and through any officer or officers or civilian officials of their respective departments and agencies designated by them for those purposes. The Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United

States Maritime Commission, or the Board of Directors of the Reconstruction Finance Corporation may authorize such officer or officers or civilian officials of their respective departments or agencies to make further delegations of such powers and authority within their respective departments and agencies.

"3. In inspecting any plant engaged in producing, manufacturing, processing, constructing, altering, or repairing any defense article of a secret, confidential, or restricted nature, or which is produced, manufactured, processed, constructed, altered, or repaired in accordance with or under any secret process, formula, patent, or invention, and in auditing the books and records in connection with any such defense contract, such inspection shall be regarded as secret, confidential, or restricted, as the case may be, and all reports, records, papers, documents, and writings relating to such inspection or audit shall be marked or stamped as secret, confidential, or restricted, as the case may be, and shall be handled in accordance with regulations prescribed and in force in the department or agency concerned relating to the handling of secret, confidential, or restricted matters, reports, records, papers, documents, and writings.

"4. The power to administer oaths or affirmations and to issue subpoenas for the attendance of witnesses or the production of books, records, or other documentary or physical evidence deemed relevant to the inquiry, conferred by section 1302, and, through the Department of Justice, the power to invoke the aid of any court of the United States, conferred by section 1303, Title XIII, of said Second War Powers

Act, may be exercised, performed, or carried out by the Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, any member of the United States Maritime Commission, or the Chairman of the Board of Directors of the Reconstruction Finance Corporation, as the case may be, or by such other officer or officers or civilian officials as may be authorized, empowered or directed by any of them so to do for his respective department or agency.

"5. Nothing herein shall affect or limit the authority and power conferred upon or granted to the Chairman of the War Production Board by Title XIII of said Second War Powers Act, 1942."